No. 54, Original

In the Supreme Court of the United States

October Term, 1976

United States of America, plaintiff

v.

States of Florida and Texas

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Robert H. Bork,
Solicitor General,

Peter R. Taft,
Assistant Attorney General,

William F. Sheehan, III,
Assistant to the Solicitor General,

Bruce C. Rashkow,
Ralph J. Gillis,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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STATES OF FLORIDA AND TEXAS

RESPONSE OF THE UNITED STATES TO THE DEFENDANTS' EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

This is a suit by the United States against the States of Florida and Texas for a declaration that they lack jurisdiction to enforce their fishery laws against foreign vessels and crews in the sea more than three geographical miles from the coastline of the United States in the Gulf of Mexico. The motion of the United States for leave to file the complaint in this case was granted on March 20, 1972, and the defendant States filed their answers claiming such jurisdiction on May 22, 1972. On June 26, 1972, this Court appointed a Special Master to conduct hearings and make recommended findings of fact and conclusions of law. The parties have been engaged in discovery since January 1973.

On July 14, 1975, the defendant States jointly moved for leave to file a counterclaim for a declaration that they have jurisdiction to enforce their fishery laws against foreign vessels and crews within three geographical miles of the coastline. The United States opposed the

motion by memorandum dated September 1975. On December 8, 1975, this Court referred the matter to Special Master Olin Hatfield Chilson,[1] who heard oral argument by the parties on February 17, 1976. On April 19, 1976, the Special Master filed his Report on Motion of Defendants for Leave to File a Counterclaim, concluding that the proposed counterclaim is barred by the sovereign immunity of the United States.[2]

As we elaborate below (pp. 4-8, *infra*), the Special Master's conclusion is correct. At the outset, however, we suggest another factor that militates against consideration of defendants' counterclaim in this case: whereas defendants are the only States whose interests appear to be implicated by the question presented for adjudication by the United States, resolution of the question defendants now seek to raise by counterclaim would affect the rights of all coastal States.

Defendants in their counterclaim seek adjudication of their rights in the territorial sea of the United States, *i.e.*, the belt of sea lying within three geographical miles of the coastline of the United States, whereas the complaint of the United States relates not to the territorial sea but rather to the contiguous zone that extends seaward therefrom. By the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1301 *et seq.*, and the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331

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[1]Judge Chilson was appointed after the death of the Honorable Charles L. Powell, the Special Master originally appointed by the Court in this case.

[2]The Special Master also recommended that if this Court should disagree with his conclusion that sovereign immunity bars the counterclaim, then defendants' motion for leave to file the counterclaim should be granted notwithstanding the government's argument that the issue defendants seek to raise is not ripe for adjudication.

et seq., Congress granted the separate coastal States proprietary interests in the natural resources of the seabed and the navigable waters within the States' seaward boundaries, but retained for the United States the ownership of the natural resources of the Continental Shelf seaward therefrom. The boundaries of all coastal States other than Texas and Florida are coterminous with the three-mile territorial sea; the boundaries of Texas and Florida extend up to a distance of three marine leagues (approximately nine geographical miles) into the Gulf of Mexico. See *United States* v. *Louisiana*, 363 U.S. 1; *United States* v. *Florida*, 363 U.S. 121. See also *United States* v. *Maine*, 420 U.S. 515.

Thus, the defendants are the only States that may legitimately claim proprietary interests seaward of the territorial sea, and therefore are the only States that may attempt to assert a claim of jurisdiction over part of the contiguous zone on the basis of such interests. It was for this reason that the United States did not name other States as parties defendant in this case. But since all coastal States now possess interests in and jurisdiction over the submerged lands and natural resources of the three-mile territorial sea, each could assert a claim of jurisdiction similar to that which defendants seek to have adjudicated. Accordingly, defendants' counterclaim implicates the concerns of every coastal State. Consideration of that counterclaim on its merits would invite, at this late stage in the proceedings, participation by other coastal States as *amici curiae*, with the resultant expansion of this litigation that such participation would entail.[3]

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[3] *Douglas* v. *Seacoast Products, Inc.*, No. 75-1255, probable jurisdiction noted April 26, 1976, presents the question whether Virginia may lawfully prohibit American corporations that are owned

ARGUMENT

SOVEREIGN IMMUNITY BARS DEFENDANTS' PROPOSED COUNTERCLAIM

The Special Master correctly determined that defendants' proposed counterclaim is barred by the sovereign immunity of the United States. "It long has been established * * * that the United States, as sovereign, 'is immune from suit save as it consents to be sued' " (*United States* v. *Testan*, No. 74-753, decided March 2, 1976, slip op. 7, quoting from *United States* v. *Sherwood*, 312 U.S. 584, 586). See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609. The rule is no different when the would-be plaintiff is a State. See, *e.g.*, *Kansas* v. *United States*, 204 U.S. 331; *Arizona* v. *California*, 298 U.S. 558, 568; *Minnesota* v. *United States*, 305 U.S. 382, 387; *Hawaii* v. *Gordon*, 373 U.S. 57, 58. And the rule applies to all suits against the sovereign, not simply to the types of actions listed by defendants (Exceptions, pp. 5-6). "[W]aiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States* v. *King*, 395 U.S. [1, 4]; *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). Thus, except as Congress has consented to a cause of action against the United States, 'there is not jurisdiction in * * * [any court] to entertain suits against the United States.' *United States* v. *Sherwood*, 312 U.S. at 587-588" (*United States* v. *Testan*, *supra*, at 7).

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by foreign interests from fishing in the territorial sea off Virginia's coast. The question defendants seek to raise here—whether the coastal states may regulate foreign vessels and crews in the territorial sea would be reached in that case, it would seem, only if an American flag vessel might somehow be deemed to lose its domestic status by virtue of the foreign ownership of the corporation to which it belongs.

The sovereign immunity to suit bars counterclaims as well as original complaints. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512; *United States* v. *Shaw*, 309 U.S. 495, 503-505; *Illinois Central R.R. Co.* v. *Public Utilities Commission*, 245 U.S. 493, 504-505. Defendants argue that this rule may be abrogated "[w]here justice require[s]" (Exceptions, p. 7), citing *United States* v. *The Thekla*, 266 U.S. 328,[4] but the holding in that case—that when the United States libels a vessel for collision damages a cross-libel, determination of which is necessary to reach a conclusion

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[4]Defendants also rely upon *United States* v. *Martin*, 267 F. 2d 764 (C.A. 10), a decision relying uncritically on *United States* v. *The Thekla* without acknowledging that that case had been limited to its admiralty setting by *Shaw*. The other lower court decisions cited by defendants (Exceptions, pp. 8-9) are similarly unpersuasive. No counterclaim at all was asserted in *Lacy* v. *United States*, 216 F. 2d 223 (C.A. 5), where the court held that, as a condition precedent to a judgment requiring a landowner to remove certain property from an illegally-established government right of way, the United States would have to pay just compensation for the taking of the land involved. In *Jacobs* v. *United States*, 239 F. 2d 459 (C.A. 4), the court, distinguishing the entertainment of a counterclaim not authorized by Congress (which, the court recognized, *Shaw* forbids) from "conditioning the granting of equitable relief upon the doing of justice with respect to the subject matter of the relief granted" (*id.* at 462), held that it was proper to order the United States to pay the contract price as a condition of the decree awarding the government specific performance. Whatever may be said for the court's distinction, the case is inapposite here, where the United States does not seek equitable relief. In *United States* v. *Briggs*, 514 F. 2d 794 (C.A. 5), the court held that sovereign immunity did not bar unindicted coconspirators from moving, in a criminal proceeding initiated by the government, to have the references to them expunged from the indictment. The court of appeals there relied upon the fact that the judgment in that case ran against the clerk of the court, not against the United States; thus the decision has no relevance here. See 514 F. 2d at 808 and n. 25.

as to liability for the collision, may be filed—was expressly restricted to the special characteristics of claims for collisions in admiralty by the later decision in *United States* v. *Shaw, supra,* 309 U.S. at 502-504.

In *Shaw* this Court reaffirmed that sovereign immunity bars suit by way of counterclaim, notwithstanding the arguments made there by the respondent (309 U.S. at 501-502) that "when a sovereign voluntarily seeks the aid of the courts * * * it takes the form of a private suitor and thereby subjects itself to the full jurisdiction of the court" and that "the necessity for a complete examination into the [counterclaim]" and the "principle of a single adjudication" militate in favor of allowing counterclaims. In rejecting these arguments and refusing "to extend the waiver of sovereign immunity more broadly than has been directed by the Congress" (309 U.S. at 502), the Court adhered to the longstanding rule enunciated in *Nassau Smelting Works* v. *United States,* 266 U.S. 101, 106:

> The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it.

The only congressional authority allowing suit against the United States by way of counterclaim when sovereign immunity would bar an original action appears in 28 U.S.C. 2406,[5] allowing counterclaims "to the amount of the government's claim" (*United States* v. *Shaw, supra,*

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[5]Section 2406 provides, in pertinent part, that "[i]n an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he proves that such claim has been disallowed * * * by the General Accounting Office * * * ."

309 U.S. at 501). This limited waiver of the general rule that the United States does not, by initiating suit, consent to be sued on counterclaims has no application where, as here, the government's suit is not for money and the counterclaim is not a "claim for a credit." 28 U.S.C. 2406.[6]

No waiver of immunity from counterclaim appears in the Federal Rules of Civil Procedure. On the contrary, Rule 13(d) states that "[t]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States * * * ."

In sum, defendant's argument (Exceptions, p. 8) that adjudication of their counterclaim is imperative lest "justice" be denied misses the point. The sole question is whether Congress has consented to the suit, and it is not for the courts "to tamper with these established principles [of sovereign immunity] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy" (*United States* v. *Testan, supra,* at 8; see also *United States* v. *Shaw, supra,* 309 U.S. at 502). Since the United States has not consented to the suit that the defendant

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[6]Another possible exception to the general rule may be that when the government brings property into court it thereby consents to an adjudication of all rights therein. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 26, n. 84 (1963). This exception also does not apply here, for the United States is not seeking an adjudication of property rights in a particular *res* and, even if its suit could be so construed, the "property" involved, however it might be defined, would be "property" lying more than three miles seaward from the coastline, whereas the defendant States' counterclaim involves different "property" lying within three miles of the coastline.

States seek to bring against it by way of counterclaim, that suit is barred by sovereign immunity.

Moreover, contrary to defendants' claims, justice is not denied by this result. The question raised by the proposed counterclaim is in our view markedly different from that posed by the United States' complaint (see our Memorandum in Opposition to Defendants' Motion for Leave to File a Counterclaim, pp. 6-7). Thus, even if Rule 13, Fed. R. Civ. P., applied, defendants' counterclaim would not be compulsory, and there is no reason to grant defendants a privileged status, not enjoyed by any other coastal State, to sue the United States regarding the territorial sea simply because the United States has sued them regarding the contiguous zone.[7] Furthermore, if we are wrong and if, as defendants assert (Exceptions, p. 6), their rights "with respect to fishing by foreign vessels off their coasts is one subject matter from the shore seaward to their recognized boundaries," then determination of the United States' complaint will assure adjudication of all the relevant issues, and the filing of defendants' counterclaim is unnecessary.

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[7] Justice would not be denied by a denial of defendants' motion for the additional reason that the question they seek to raise is not ripe for adjudication (see our Memorandum in Opposition, *supra*, at pp. 6-7). The Special Master recommended that the issue of ripeness be litigated with the merits of the counterclaim if it is held not barred by sovereign immunity. Our position, however, is that the defendant States have not even alleged any facts sufficient, if true, to show a justiciable controversy. Thus the counterclaim fails *in limine* and we urge the Court to deny the motion for leave to file it for this reason as well as for reasons of sovereign immunity.

CONCLUSION

The defendant States' exceptions to the Report of the Special Master should be overruled and the motion for leave to file a counterclaim should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.

BRUCE RASHKOW,
RALPH J. GILLIS,
Attorneys.

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